No. 268.

Brf. of Mecartney for D. E.

Office Supreme Court U. S.
FILED
JAN 21 1902
JAMES H. MCKENNEY,
Clerk.

Filed Jan. 21, 1902.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

No. 268.

GERTRUDE H. HARDIN AND THE COOK COUNTY CANAL AND DOCK COMPANY,
PLAINTIFFS IN ERROR,

vs.

CHARLES B. SHEDD,
DEFENDANT IN ERROR.

In Error to the Supreme Court of the State of Illinois.

BRIEF FOR DEFENDANT IN ERROR.

HARRY S. MECARTNEY,
FOR DEFENDANT IN ERROR.

BARNARD & MILLER PRINT, CHICAGO.

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Memorandum of Corrections to be Made in Brief for Defendant in Error.

On page 37 strike out the words: "In doing so he took the *actual* shore lines on sketch 1, and then ran the apportioning lines as shown on 'sketch 3.'"

On page 44 strike out the word "Resume."

HARRY S. MECARTNEY,
For Defendant in Error.

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vs.
CHARLES B. SHEDD,
Defendant in Error.

In Error to the Supreme Court of the State of Illinois.

Brief and Argument for Defendant in Error.

The writ of error herein has been sued out by the plaintiffs in error to reverse the judgment of the Supreme Court of Illinois, rendered in *Hardin* v. *Shedd*, 177 Ill., 123.

A reference to that decision and the earlier one of *Fuller* v. *Shedd*, 161 Ill., 462, would probably be the quickest way of placing before the court the controlling facts or issues here involved. The statements in those cases are full and naturally free from all danger of bias.

It probably would have done no violence to the economy of this court's time for opposing counsel to have first called attention to the State Court's judgment and decree, and then made a showing as to the Federal question which plaintiffs in error claim to have raised.

If this were resolved against them, or if this court should hold the whole question involved in its review to be one of local law and for the Illinois Supreme Court to decide, this court would have been saved the labor of reading the long detailed statements of facts in the first seventy-two pages of the brief.

The cases cited under the first two points in this brief are relied upon with confidence to show that there is no Federal question involved here.

The remainder are useful only in the event the court finds that it should review the action of the State Court, and are addressed to the merits of the decree, and the judgment affirming it.

The points to be made herein in the order treated below are:

1. No Federal question was "specially raised" by plaintiffs in error in the state courts.

2. The decision of the Illinois Supreme Court complained of involved a question of local law purely upon which its judgment was final.

3. This court will not inquire into the alleged errors of practice. Even if a Federal question were involved here, it would examine such question alone.

4. No such errors of practice were in fact committed.

5. The character of Wolf Lake, and the state's title to the bed thereof, and its jurisdiction thereover are all within the scope of local law and are by the State Supreme Court's decision foreclosed from inquiry here.

6. The apportionment of accretions under the decree is accurate and just.

7. Defendant in error takes no more land by the decree upon the accretion basis than he would have taken if the title to the submerged lands had been held to have passed under the patents.

I.

NO FEDERAL QUESTION WAS SPECIALLY RAISED IN THE STATE COURTS.

This writ of error is prosecuted under Section 709 of the United States Statutes. That section, so far as material here, is as follows:

"Or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the title, right, privilege or immunity, specially set up or claimed by either party, under such Constitution, treaty, statute, commission or authority—may be reexamined and reversed or affirmed in the Supreme Court upon a writ of error."

For the purpose of ascertaining precisely what attempts, if any, were made in the State courts by plaintiffs in error to raise a Federal question, we shall quote the pertinent parts of their answers in the Cook County Circuit Court and their assignments of error in the Illinois Supreme Court.

In the answer of Mrs. Hardin (Record, 30), which was adopted by the other plaintiff in error, it is alleged:

"That prior to thesurvey * * * the proprietary right to the lands in question and to the lake bed, and to the lake itself, was in the United States; that

after such survey had been made, the lands were regularly brought into market in pursuance of the Acts of Congress, and * * * were entered or purchased from the United States; that the same were sold and granted by the United States according to the plat of the survey thereof, returned to the General Land Office by the surveyor general; * * * that such lake bed passed to the patentees, who thereupon became and were seized thereof and as such of the same in fee simple; that it is under this claim that respondent's rights arose and exist; that therefore, as well as for other reasons, the attempted survey of the lake bed in 1874 was wholly unauthorized and irregular, etc.; that the rights of the grantees of said lands or patentees from the United States were fixed by the Common Law, and that the * * * respondent claims to the center of the lake as a part of the grant made by said patent of lands represented on said plat as bordering on said lake."

Mrs. Hardin and the Cook County Canal and Dock Company, on their appeal to the Illinois Supreme Court assigned amongst others the following errors:

"2. That said court erred in holding that the title to any of the lands, whether submerged or unsubmerged, was in the State of Illinois, and in refusing to give due effect to the patents through which appellants respectively deraigned title."

"5. That said court erred in not following or observing the riparian rights of said appellants, respectively, in respect to the present or existing Wolf Lake, and in refusing to allow them, respectively, any frontage thereon."

"7. That the basis or principle on which the decree proceeded in declaring divisional lines is contrary to the law and the equity of the case."

"8. That the decree is uncertain as to boundaries given, and is otherwise unjust to said appellants, severally and respectively."

It is apparent from an inspection of Mrs. Hardin's answer and the said assignments of error that no attempt was made in the state courts to set up any Federal question which could be reviewed in this court, unless it was some "title, right, privilege or immunity" claimed under a statute of the United States.

Nowhere in their answers is set up or specified any statute of the United States under which any right, title, privilege or immunity is claimed. On the contrary, in the answer of Mrs. Hardin, which was adopted by the other plaintiff in error, it is expressly stated "that the rights of the grantees of said lands or patentees from the United States were fixed by the *common law* and that method of adjustment of lines extending into the lake or through or over the body of water represented on said plat as a lake and is governed by *said law*, and by the rules which are thereby established."

The suggestions that after such survey the lands "were regularly brought into market in pursuance of the acts of Congress in such case made and provided," that such lands "were sold," etc., do not reveal any right or title specially set up or claimed under a United States *statute*. If this is a sufficient raising of a Federal question, the rule requiring it to be "specially set up or claimed" is

meaningless, since in such case it would be permissible to rely upon the whole body of the United States statutory law, without specifying any portion thereof.

The Federal question, as presented by the assignment of errors in the Illinois Supreme Court, is more tenuous even than in the answers in the Circuit Court. In said assignment of errors there is no reference, general nor special, to any statute of the United States. Nor is there any reference to any right claimed under a Federal statute.

The nearest approach to a Federal question which was raised in the Illinois Supreme Court was presented by the second error assigned *supra*.

In view of the numerous decisions of this court on this question we are apt to be "carrying coals to Newcastle," in attempting to review the authorities.

In the matter of *August Spies et al.*, 121 U. S., 131, the court say:

> "To give us jurisdiction * * * it must appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time and in the proper way. To be reviewable here the decision must be against the right so *set up or claimed*. As the Supreme Court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more. This is not, as seems to be supposed by counsel for the petitioners, a question of the waiver of a rignt under the Constitution, laws or treaties of the United States, but a question of claim. If the right was not set up or claimed in the proper court below, the judgment of the highest court of the state in the action is conclusive, so far as the right of review here is concerned."

The case of *Maxwell* v. *Newbold*, 59 U. S., 511, was a writ of error to the Supreme Court of Michigan. In the State Supreme Court the third error assigned was as follows:

> "The charge of the court, the verdict of the jury and the judgment below, are each against and in conflict with the Constitution and laws of the United States, and therefore erroneous."

Chief Justice TANEY, delivering the opinion of the court, said:

> "Neither of the questions made there by the errors assigned refer in any manner to the Constitution or laws of the United States, except the third, and the language of that is too general and indefinite to come within the provisions of the Act of Congress, or the decisions of this court. It alleges, that the charge of the court was against, and in conflict with, the Constitution and laws of the United States. But what right did he claim under the Constitution of the United States which was denied him by the State court? Under what clause of the Constitution did he make his claim? And what right did he claim under an Act of Congress? And under what act in the wide range of our statutes did he claim it?
>
> "* * * So, in the case before us, the clause in the Constitution and the law of Congress should have been specified by the plaintiffs in error in the State court, in order that this court might see what was the right claimed by them, and whether it was denied to them by the decision of the state court."

In *Hoyt* v. *Thompson*, 66 U. S., 521, the court said:

> "But in order to give this court the power to revise the judgment of the state court on that ground, it must appear upon the transcript filed by the plaintiff in error, that the point upon which he relies was made in the New York Court and

decided against him; and that this section of the Constitution was brought to the notice of the state court, and the right which he now claims here claimed under it."

The apparent confusion in regard to the particularity necessary in order to comply with the requirement of Section 709 of the Revised Statutes, that the right, title, privilege or immunity must be "specially set up or claimed" was removed in the decision of this court, by Mr. Justice BROWN, in the case of *Columbia Water Power Co.* v. *Columbia Electric Street Railway Co.*, 172 U. S., 476.

In that case the court said:

"To the argument that the Federal right was not 'specially set up and claimed' in the language of Revised Statutes, Section 709, it is replied that this is not one of the cases in which it is necessary to do so. Under this section there are three classes of cases in which the final decree of a state court may be re-examined here."

(1.) "Where is drawn in question the validity of a treaty, or statute of, or authority exercised under the *United States*, and the decision is against their validity."

(2.) "Where is drawn in question the validity of a statute of, or an authority exercised under, any *state* on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is *in favor of* their validity."

(3.) "Or where any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is *against* the title, right, privilege or immunity *specially set up and claimed* by either party under such constitution, statute, commission or authority."

"There is no doubt that under the third class the Federal right, title, privilege or immunity

must be, with possibly some rare exceptions, specially set up or claimed to give this court jurisdiction."

"But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that, if the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, that fact that it was not specially set up and claimed, is not conclusive against a review of such question here."

The following cases are also instructive upon this point.

Chappell v. *Bradshaw*, 128 U. S., 132.
Zadig v. *Baldwin*, 166 U. S., 485.
Kipley v. *Illinois*, 170 U. S., 182.
Oxley Stave Co. v. *Butler Co.*, 166 U. S., 649.
Telluride Power etc., Co. v. *Rio Grande etc., R. R. Co.*, 175 U. S., 642.
Chapin v. *Frye*, 179 U. S., 127.

THE CERTIFICATE OF THE CHIEF JUSTICE OF THE ILLINOIS SUPREME COURT DOES NOT GIVE THIS COURT JURISDICTION.

The Chief Justice of the Illinois Supreme Court entered an order to the effect that the plaintiffs in error, "by virtue of or under the land office certificates and patents from the United States * * * claimed title in fee to the lake bed or submerged lands in front of the tracts respectively described in said patents, respectively, as being part of the grant from the United States;" that said parties claimed the land to the center of the lake, and that the court "finding

that the lake, though non-navigable, was meandered in the government survey, denied the right of the said appellants to the lake bed or submerged lands, except as accretions were or should be formed, limiting them to the waters' edge, but giving them rights as the waters should recede, as the opinion of the court shows." (Record, 2.)

The heading to this order in the transcript, although of course not a part of the order, is: "order that a Federal question is presented." But there is nothing in the order itself to indicate that the court's attention was called to or that it passed upon any right, title, privilege or immunity under an act of Congress.

The learned counsel, in his brief, states that a Federal question was distinctly raised in the state courts.

It is submitted, however, that neither counsel's statement, nor the heading to the order, nor the order itself can make a Federal question out of a matter which is one of local law purely. It is especially urged that the order in question did not and could not show that any Federal question was raised in the state courts.

In *Powell* v. *Supervisions*, 150 U. S., 433, the court say:

> "The determination of the jurisdiction of this court to review the judgment of a state court under Section 709, of the Revised Statutes, necessarily devolves upon the court itself, and while the certificate of the presiding judge of the State Court as to the existence of the state of the case upon which our interposition may be successfully invoked is always regarded with respect, it cannot confer jurisdiction upon this court to re-examine the judgment below." Citing numerous cases.

II.

THE DECISION OF THE ILLINOIS SUPREME COURT COMPLAINED OF INVOLVED A QUESTION OF LOCAL LAW PURELY UPON WHICH ITS JUDGMENT WAS FINAL.

The local law of the state in which lands patented by the United States lie governs the construction to be given to grants of lands bordering upon waters whether navigable lake, navigable stream or non-navigable lake or stream.

The proposition above stated is the pivotal question of this case. If the law is correctly stated in it, this court is without jurisdiction to entertain this writ of error irrespective of the technical questions of procedure herein discussed.

If the law of Illinois is the test of the rights of the parties to this case under the titles shown by them, the whole contention of plaintiffs in error here resolves itself into a challenge of the correctness of the announcement by the Supreme Court of Illinois of what the law of that state is in the premises, and the "Federal question" is nothing more or less than this: "did the Supreme Court of Illinois correctly apply the laws of Illinois to this case in which both parties are its citizens? If that were a "Federal question" every judgment of a state court of final resort would be reviewable in this court.

That the proposition stated above is the doctrine of this court there can no longer be any possible doubt. That is the one point on which both the majority and the dissenting minority of this court agreed in *Hardin* v. *Jordan*, 140 U. S., 371.

Mr. Justice BRADLEY in the majority opinion in that case after reciting the facts, opens his discussion of the law with this preliminary statement:

> "Such being the form of the title granted by the United States to the plaintiff's ancestor, the question is as to the effect of that title in reference to the lake and the bed of the lake in front of the lands actually described in the grant. *This question must be decided by some rule of law, and no rule of law can be resorted to for the purpose except the local law of the State of Illinois.*" * * *
>
> "This right of the state to regulate and control the shores of tidewaters and the lands under them, is the same as that which is exercised by the crown in England. In this country the same rule has been extended to our great navigable lakes, which are treated as inland seas; and also in some of the states, to navigable rivers, as the Mississippi, the Missouri, the Ohio, and in Pennsylvania, to all the permanent rivers of the state; *but it depends on the law of each state to what waters and to what extent this prerogative of the state over the lands under water shall be exercised.*"

In another place in the same opinion the learned writer says:

> "We do not think it necessary to discuss this point further. In our judgment, the grants of the government for lands bounded on streams and other waters, without any reservation or restriction of terms, are to be construed, as to their effect, according to the law of the state in which the lands lie."

The learned justice then proceeded in the logical order to inquire what was the local law of Illinois on the subject in hand and reached the conclusion that it was the general common law unchanged.

He next inquired what the common law was in such a case and concluded that it gave the riparian proprietor title to the bed of the lake to the center thereof.

There is no suggestion in this opinion of any doubt that this court would be bound to follow any distinct and unmistakable declaration by the Supreme Court of Illinois of what the law applicable was, whether it accorded with this court's view of the common law or not.

The dissenting opinion rendered in that case by Mr. Justice BREWER, and concurred in by Justices GRAY and BROWN, adopts the same doctrine of the controlling authority of the local law of Illinois, but reaches a contrary conclusion in its inquiry as to what is the "local law of Illinois," applicable to the case.

This opinion opens with the following paragraph:

> "Mr. Justice GRAY, Mr. Justice BROWN and myself are unable to concur in the foregoing conclusion. Beyond all dispute the settled law of this court, established by repeated decisions, is that the question how far the title of the riparian owner extends is one of local law. For a determination of that question the statutes of the state and the decisions of its highest court furnish the best and the final authority. In the case *St. Louis* v. *Rutz*, decided at the present term (138 U. S., 226, 242), it was said by Mr. Justice BLATCHFORD, speaking for the court: 'the question as to whether the fee of the plaintiff, as a riparian proprietor on the Mississippi river, extends to the middle thread of the stream, or only to the waters' edge, is a question in regard to a rule of property, which is governed by the local law of Illinois.' *Barney* v. *Keokuk*, 94 U. S., 324, 338; *St. Louis* v. *Myers*, 113 U. S., 566; *Packer* v. *Bird*, 137 U. S., 661. In *Barney* v. *Keokuk*, it is said that if the states 'choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objection.'"
>
> The cases referred to in this quotation affirm the same doctrine."

In the case of *Shively* v. *Bowlby*, 152 U. S., 1, this court entered into a most exhaustive examination of the questions affecting riparian rights and the law applicable thereto. *Hardin* v. *Jordan*, *supra*, is discussed and special attention given to the fact that both the majority and minority opinions agreed that the law applicable to the case was the local law of Illinois.

Perhaps the most succinct statement of the law in the opinion, which was rendered by Mr. Justice GRAY, is contained in the following paragraph:

> "In *Parker* v. *Bird* (1891), 137 U. S., 661, the general rules governing this class of cases were clearly and succinctly laid down by the court, speaking by Mr. Justice FIELD, as follows: 'the courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the states for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants, or the use and enjoyment of the property by the grantee. As an incident of such ownership, the right of the riparian owner, where the waters are above the influence of the tide, will be limited according to the law of the state, either to low or high water mark, or will extend to the middle of the stream,' 137 U. S., 669, 670. And it was accordingly held, affirming the judgment of the Supreme Court of California, in 71 Cal., 134; and referring to the opinion in *Barney* v. *Keokuk*, above cited, as specially applicable to the cases, that a person holding lands under a patent from the United States, confirming a Mexican grant bounded by the Sacramento river, which was navigable in fact, took no title below the high water mark, either under the Acts of Congress or by the local law."

In *St. Anthony Falls Water Power Co.* v. *Board of Water Commissioners*, 168 U. S., 349, this court had under consideration a writ of error to the Supreme Court of Minnesota in a case affecting riparian rights and passed on identically the same questions which must control this case.

Mr. Justice PECKHAM, delivering the opinion of the court says:

> "In regard to the first proposition, we are of the opinion that the property rights of the plaintiff in error, as riparian owners, are to be measured by the rules and decisions of the State of Minnesota. This principle, we think has been announced and adhered to by this court from its very early days, and no distinction has been made between the rights of the original states and those which were subsequently admitted to the Union under the provisions of the Federal Constitution."

In another place the learned Justice says:

> "It is true that in these various cases the exact point in controversy in this case in regard to the rights of the state as against riparian owners has not arisen. The dispute has generally been as to the extent and character of the title as between the United States, or the state and the riparian owner to lands under water, and as to the right of the riparian owner to build out from the shore piers or wharves so as to reach the navigable portion of the stream; but the principles laid down in all of these cases necessarily include the rights of the state courts to decide, as a matter of local law, the point now under discussion, subject to the acknowledged jurisdiction of the United States under the Constitution in regard to commerce and the navigation of the waters of rivers. The jurisdiction of the state over this question of riparian ownership has been always

and from the foundation of the government, recognized and admitted by this court. The extent of the plaintiffs' riparian right of property was therefore the subject of adjudication by the State Court, and the rule has been definitely stated by that court in its judgment which is now under review.

"It is claimed, however, by the plaintiffs in error that this judgment is the only case in the state where the ruling made therein has been adopted, and that this particular judgment is at war with and opposed to every other ruling upon the subject heretofore made by the Supreme Court of this state; and they contend that upon the authority of *Hardin* v. *Jordan, supra*, this court should disregard the judgments of the State Court in this case and follow the previous decisions of that court on this subject. As to the case of *Hardin* v. *Jordan*, it may be said that it went as far as this court ought to go in refusing to follow the ruling of the Supreme Court of Illinois, in *Trustees of Schools* v. *Schroll*, 120 Illinois, 509. It was placed upon the asserted fact that such ruling of the Supreme Court of Illinois was not necessary to the decision of the case, and that, being opposed to the entire course of the previous decisions of that state, it should be disregarded. It is not so here. The ruling of the State Court was necessary to the decision of this case and stands as the latest, if not the only, exposition of the views of that court upon the question involved. We ought therefore to follow that case."

As notice, in *Hardin* v. *Jordan*, this court unanimously held that the determination of the riparian rights of the patentees on *this particular lake* is a matter entirely within the right of the Supreme Court of Illinois to determine. That court has spoken in this case. No" Federal question," can possibly be involved in a state court's decision as to questions governed entirely by its own law.

The inevitable logic of the case is that no question is raised here which this court will be called upon to consider except the *claim* made that a Federal question is properly raised on this record. *Hardin* v. *Jordan*, *supra*, and the other cases cited settle that adversely to plaintiff in error, it would seem, beyond the possibility of cavil.

It was decided in *Hardin* v. *Jordan*, that the shore owners took to the center of the lake in question. This decision was based upon the theory that it was in accordance with the decisions of the Illinois Supreme Court.

After the decision in *Hardin* v. *Jordan*, *supra*, the Illinois Supreme Court has twice distinctly and unequivocally decided that such shore owners do not take to the center of the lake, but to the water's edge only. One of these decisions is the one which is under review here. The other is the case *Hammond* v. *Shepard*, 186 Ill., 235.

Under these circumstances it is contended that this court is not bound to follow the latest decisions of the state court, and "is not bound to surrender its own judgment of the law," etc.

In support of this contention the learned counsel for plaintiffs in error cited the following cases:

Yates v. *Milwaukee*, 77 U. S., 497;
Pease v. *Peck*, 59 U. S., 595;
Town of Roberts v. *Bolles*, 101 U. S., 119;
Morgan v. *Cortenius*, 20 How., 1, and
Gibson v. *Lyon*, 115 U. S., 439.

In regard to the above cases, it need only be said at this time that none of them originated in the state

courts. The distinctions in the rule, pointed out in later decisions of this court, between cases originating in the United States Courts and cases originating in the state courts effectually disposes of the above cases as authority here.

In *Central Land Co.* v. *Laidley*, 159 U. S., 103, Mr. Justice GRAY, speaking for the court said:

> "The distinction as to the authority of this court between writs of error to a court of the United States and writs of error to the highest court of a state, is well illustrated by two of the earliest cases relating to municipal bonds, in both of which the opinion was delivered by Mr. Justice SWAYNE, and in each of which the question presented was whether the constitution of the State of Iowa permitted the legislature to authorize municipal corporations to issue bonds in aid of the construction of a railroad. The Supreme Court of the state, by decisions made before the bonds in question were issued, had held that it did; but, by decisions made after they had been issued, that it did not. A judgment of the District Court of the United States for the District of Iowa, following the later decisions of the state court, was reviewed on the merits, and reversed by this court, for misconstruction of the constitution of Iowa. But a writ of error to review one of those decisions of the Supreme Court of Iowa, was dismissed for want of jurisdiction, because admitting the constitution of the state to be a law of the state * * * the only question was of its construction by the state court."
>
> "This court, therefore, has no authority to decide the main questions argued at the bar, whether the decision of the Supreme Court of Appeals of West Virginia, in effect, and erroneously, overruled the prior decisions of that court, * * * and the writ of error must be dismissed for want of jurisdiction."

In *Wade* v. *Travis County*, 174 U. S., 499, which was taken from the United States Court of Appeals, to this court on a writ of certiorari, this court in speaking of the rule in question, said:

> "If there be any inconsistency in the opinions of these courts, the general rule is that *we follow the latest settled adjudication in preference to the earlier ones.* * * * In *Green* v. *Neal's Lessee*, 6 Pet., 291, a construction given by the Supreme Court of Tennessee to the statute of limitations of that state having been overruled, this court followed the latter case, although it had previously adopted the rule laid down in the overruled case."

The claim of plaintiffs in error is tantamount to asking this court to hold:

1. That, while the rule of the effect or extent of the grant is one to be decided by the State Court; and, 2, while in any suit pending in this court the State Court's holdings will be followed if ascertainable; 3, yet, where the State Court has formally and explicitly announced its ruling, and this should, perchance, be different from a certain *prior* decision of this court, the latter should continue ever afterwards to differ from the State Court, and the matter as to *that particular state* be held *not* to be one of local law.

III.

THIS COURT WILL NOT INQUIRE INTO THE ALLEGED ERRORS OF PRACTICE. EVEN IF A FEDERAL QUESTION WERE INVOLVED, IT WOULD EXAMINE SUCH QUESTION ALONE.

A writ of error to a state court brings before the Supreme Court only the Federal question in the case.

Ashley v. *Ryan*, 153 U. S., 436.

The Supreme Court will not review any question as to the admission or rejection of evidence in the State Court which does not bear directly upon some matter of a federal nature.

Mallett v. *North Carolina*, 181 U. S., 589.
Cleveland & Co. v. *Backus*, 154 U. S., 439.
Central Pacific etc., Co. v. *State of Cal.*, 162 U. S., 91.

IV.

NO SUCH ERRORS OF PRACTICE WERE IN FACT COMMITTED.

It is not thought that this court will look into these questions. The alleged errors of practice in the state Circuit and Supreme Court are, as we gather from the brief of the opposisition as follows:

1. That the decree awarded to Mr. Shedd property which he did not claim in his petition.

2. That the Circuit Court erred in ruling out evidence of the judgment by default in United States Circuit Court in the *Hardin* v. *Jordan* case.

3. That said Circuit Court erred in ruling out evidence that Wolf Lake "has but little depth or likelihood of permanence unless artificially sustained and protected," and "that for *some* years it has been kept at an artificial elevation by the petitioner, Shedd," for ice purposes, etc.

This case is what is locally called a "Burnt Record" case. In such a proceeding, the court has power after ascertaining the destruction of the records, to

restore the record of lost deeds, etc., to decree in whom title is vested, and to proceed according to general chancery practice.

In the two petitions of Mr. Shedd he claimed to be the owner of "Fractional section 29, and south-west fractional quarter of section 20." (Record, 11 and 14.)

These descriptions were entirely adequate to describe the land, no matter where the boundary lines should be held to run—whether to have originally extended across submerged land, and to have been thus permanently fixed, or to have been originally confined to upland or dry land and to have gradually extended with the growth of accretions.

This being so it matters not that Mr. Shedd in his petition adds to his description of the fractional south west quarter of section 20, the statement "including" certain land, etc.

For it is now well settled that "fractional" sections or quarter sections as established by United States surveys upon meandered waters may extend beyond the boundaries of such sections or quarter sections as ordinarily squared out. And, although in the pleadings of several of the parties (Mr. Shedd included), it is intimated that the pleader supposed that the fractional quarter section would be held to be squared out in the ordinary manner, the lawsuit was for the recovery of *all* "fractional S. W. ¼ of section 20," and *all* "fractional 29," etc., each of which is in and of itself a definite and certain description.

The lands claimed by Mrs. Hardin overlapped with those lands claimed by Mr. Shedd. And she in various ways raised the issue of boundary lines both in her

answers and cross-petitions, many of which allegations are scheduled on pages 14 to 22 of her counsel's brief herein, such as the claim (p. 14): "That petitioner (Shedd) should be limited to a tract of about seven acres in the south-west quarter of fractional section 29;" (p. 15): "Respondent claimed to be the owner in fee of a larger portion of section 29, the same being a part of the lake bed," and "That there should be a *fair adjustment of the rights of the petitioner (Shedd) and of the respondent in respect to the lake bed,* etc.;" (p. 19): "That her petition as to the two first named tracts" (S. E. frl. ¼, Sec. 19, and the N. E. frl. ¼, Sec. 30), "*extended to the center of Wolf Lake;*" that the judgment in the suits theretofore pending in the United States Courts "gave rights to the *lake bed to the center of the lake,*" etc. (p. 21): that in her cross-petitions Mrs. Hardin "asked *affirmative relief* as applicable to the aforesaid tracts in sections 19 and 30, and such portions 'of the bed of the lake,' as she would be entitled to, etc. (p. 21).

Hence all the lands here claimed by these parties were involved in this proceeding originally and each party sought by his or her pleadings either by answer or petition or cross-petition to have *riparian rights and boundaries* adjusted. The mantle of the suit was as wide as the scope of the pleadings.

2. Mrs. Hardin's answer referred to the then pending United States Court case of *Hardin* v. *Jordan*, but she did not plead said action in bar of this proceeding or ask to have the latter stayed until the former should be finally disposed of.

In no evnet could Mrs. Hardin successfully have taken either of these steps, for Mr. Shedd was not a party to the Federal court cases. (Record, 435.) But with no protest from any of the parties the State Court proceeding has been pressed to a finality.

After the Illinois Supreme Court had finally decided the claims under the second patents of 1874 to be void Mrs. Hardin took judgment by default in the United States Circuit Court against the so-called "second patentee" defendant in said cause of *Hardin* v. *Jordan* (Mr. Dent's brief, p. 228), the judgment being so drawn as to cover a large quantity of land ultimately awarded to Mr. Shedd in the decree herein under review here. (Record, 433.)

The said judgment (entered December 10, 1896, Record, 431), was rendered after the judgment in *Fuller* v. *Shedd* (January 17, 1896, Record, 426).

The latter was the first *final* adjudication of the subject-matter, and even had the parties to both cases been identical, the former could not have been pleaded in abatement or bar thereof.

In the motion made by Mrs. Hardin in the ejectment case for a writ of possession it was suggested to the court, Judge SEAMAN presiding, that since the commencement of said cause, Shedd had entered upon certain portions of the land in question and given leases to certain persons formerly tenants of the second patentees and who were defendants to said suit (p. 227 of Mr. Dent's brief). Judge SEAMAN found that certain of the land upon which Mr. Shedd had entered had become and was vacant at the time of such entry and declined to issue the writ against him or his tenants as to such portions.

As to several other portions the court found that Mr. Shedd's entry was by permission of tenants under Jordan, who were parties to the judgment and that Mrs. Hardin was entitled to oust him as well as said tenants under her judgment; and the court issued the writ against them for that purpose.

The court did not intimate, however, that Mr. Shedd's title (which was adverse to all parties to said suit) was affected by such order, but expressly held that it was not. And it will be shown below that it was not.

Hence, the former suit of *Hardin* v. *Jordan* does not affect this proceeding in any manner, and is to be regarded as if it were between parties not one of whom is a party here.

An entry upon vacant land by one not a party to the suit, and having a claim of title hostile to and independent of both plaintiff and defendant, does not make him amenable to ouster under the judgment, much less does it in any way affect his title.

Sedgwick & Wait Trial Title, § 566.
State v. *Giles*, 10 Wis., 101.

While an entry of an adverse claimant during pendency of the suit by connivance with the tenant would not save the claimant from *ouster* under the writ (*Hall* v. *Dexter*, 3 Saw., 434), yet it could by no means affect the *title* untried in the action.

Sedgwick & Wait, § 562.
Murfree on Sheriff, § 1024.

So that as to either the land Mr. Shedd was alleged to have "entered upon" or that as to which he had

"given leases" his title was not adjudicated and such entries could not affect the title tried here, no matter whether the claim of adjudication had been set up by appellants under appropriate pleadings or not.

3. The offer as to the lake being artificially "sustained," etc., and in respect to it having become "permanently" dry, was vague and could have made no difference in the ultimate disposition of the case. No evidence of any such facts as existing prior to the fall of the year 1891 had been introduced in the case.

Were any discretion left in the lower court to take or not to take further testimony in the case, certainly it was correctly exercised against such admission. The whole *history* of these lakes was gone into. The quantity of land, the rising and the falling of the water in flood times and in dry times, the influences that caused the rise and fall, its connection with Lake Michigan, etc., these points were all covered by the testimony of half a hundred witnesses starting away back in the 40's and coming down to the time of the hearing. Many surveyors had made surveys of the contour of the land and water and the height and depth of each. Plat after plat was introduced in evidence, and detailed examinations based thereon, all recorded in voluminous record.

Surely, if there ever is to be an end to litigation, there is a demand for it in this case, and Judge TULEY's action in declining to hear further evidence was an exercise of the wisest discretion. The *status* of the land and water, the quantity of each, was specifically found by this court, necessarily referring to the time of the commencement of the suit, and lines could be run upon

that basis. It was, therefore, but right in the court to run the lines in this finding of facts as of that time, and if any changes in the *status* of the land or water had taken place subsequently thereto by any alleged artificial means, or otherwise, it could be the subject of a separate bill.

Again, if there were apt to arise any difficulty as alleged, in carrying out the decree of the court so entered in pursuance of the Illlinois Supreme Court's findings, there is a well known remedy of "Bill in Aid of Execution" that could have been resorted to; or such relief might have been in the nature of a supplemental bill or petition, or cross-petition; and none such was offered to be filed by the appellant.

And what if the shore line had changed? It is of necessity a shifting line. There was no telling that if the waters of Lake Michigan should rise that the area of dry land might not be less than found by this court.

To the effect that the judgment in *Fuller* v. *Shedd* was a final judgment, and that the lower court had no right to receive the offered evidence, see:

Woodham v. *Gay*, 83 Ill., 250.
Hock v. *Richardson*, 115 Ill., 431.

In *Mfg. Co.* v. *Wire Fence Co.*, 109 Ill., 71, the decree of the lower court as to payments of royalties, was held erroneous (page 81), and it was also held a *different ratio* should be paid by one party to the other. The cause was remanded to modify the decree.

Later in *Same* v. *Same*, 119 Ill., 31 (46), it was ruled that the lower court had nothing to do on said reversal but *follow directions*.

(Compare this case with the one at bar; in the former the upper court held that by the decree of the lower court one party was not compelled to pay *enough* royalty, and the cause was remanded; and the lower court directed him to pay *more*. In the present case this court found the decree of the Circuit Court awarding the lake bed to the first patentees was erroneous in giving *too much* land, and in this respect only, and that it should have *limited* them to the water's edge. Hence the only tning the court below had to do was to limit each first patent owner to the water's edge and run the boundaries on *this basis* instead of the other.)

The court says in said last cited case (p. 46):

> "Where it appears from the opinion that the *grounds of reversal* are of a character to be obviated by subsequent amendments of the proceedings *or* the introduction of further evidence, or both, it is the duty of the trial court to allow it. But where the case is remanded with directions to modify, not requiring any change in pleadings or introduction of new evidence, *but only to have decree conform to case made by the record*, nothing remains to be done but to make that modification."

V.

THE CHARACTER OF WOLF LAKE AND THE STATE'S TITLE TO THE BED THEREOF, AND ITS JURISDICTION THEREOVER ARE ALL WITHIN THE SCOPE OF LOCAL LAW AND ARE BY THE STATE COURT'S DECISION FORECLOSED FROM INQUIRY HERE.

Under headings numbered II to VIII, inclusive, XIII and XVII there are various suggestions questioning the state's title to the lake bed.

These are all foreclosed, as elsewhere shown by the decision in *Fuller* v. *Shedd*, which is to control here, and sufficient reasons are given in said decision for the holding of the State Court.

The suggestions in effect are an attack upon the whole body of state decisions where the same rule is held to be correct; and to give them out at this late day seems temerous.

Suffice it to say:

1. The state gets its title by virtue of its *sovereignty*.

2. Whether upon the establishment of the state the United States continued to hold title to the lake bed; or whether its title to the lands around the lake were held to have been a proprietary one purely and as to boundary lines to be subject to local law and state court construction; — or whether the acts of meandering and platting alone *first* brought the government title into the realm of local law;—certain it is that by the *sale* and *patenting* of the lands to private parties, the government *abandoned all* its title and yielded the lands *wholly* to the sovereignty of the state.

3. If the state can *hold* title to submerged lands by virtue of its sovereignty, it certainly can *receive* title thereto by an act which *abandons* them to its sovereignty.

The decision of the land office on the claim made to the bed of Wolf Lake under the Swamp Land Act by the State of Illinois, has no bearing on this case.

Considerable space is taken up in the brief of plaintiffs in error with the argument that the decision of this case by the state courts was erroneous on the

ground that the state was estopped to claim title to the bed of this lake by the decision of the land office adverse to a claim made by the state and the county of Cook, under the Swamp Lands Act of September 28, 1850 (9 Stat. at Large, 519).

The point is without force for several reasons. First, the question whether a state Supreme Court properly applies the law of prior adjudication is not, and cannot be a "Federal question," any more than the question whether it has properly decided any other question under its local law.

Secondly, the State of Illinois is not a party here and there was no pretense of establishing or finding any proprietary or private title or interest existing in it to the lake bed, but only a public and sovereign title which it holds in its political capacity as trustee for the whole people of the state and inalienable in perpetuity. It is the same character of title as was held to exist in the State of Illinois, in the bed of Lake Michigan in *Ill. Central Ry. Co.* v. *People*, 146 U. S., 387.

Mr. Justice FIELD rendering the opinion in that case says, in regard to the state's title in the bed of that lake:

> "But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open for preemption and sale. It is a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them and have liberty of fishing therein freed from the obstruction or interference of private parties."

VI.

THE APPORTIONMENT OF ACCRETIONS UNDER THE DECREE IS ACCURATE AND JUST.

"No. 7 of the specification of errors relied on," page 70 of our learned adversary's brief is as follows:

" That the court erred in awarding an undue portion of the former submerged lands to the said Charles B. Shedd, and an inadequate portion to the plaintiffs in error, respectively, contrary to the claim made by the said plaintiffs in error, respectively, under the laws of the United States."

Such "claim" made by plaintiffs in error was that the state court should have adopted a different basis for division, viz.: The "lake bed" rule of *Hardin* v. *Jordan*.

The complaint of an award upon *one* basis "contrary to" a demand for award upon *another* basis does not seem to be a distinct complaint of the accuracy of the actual award if the basis *adopted* be correct.

And the points scheduled in the brief proper do not any more clearly reveal such a complaint; the only ones at all applicable being Nos. XIV, XV and XVI, which are chiefly appeals for the application of the private-ownership-of-the-bed rule.

The suggestions, too, under those headings support our interpretation of them, being chiefly appeals for a shortening of the two tongues of land to almost nothing and an extension of Hrs. Hardin's lines across the *solid land* of said tongues to the state line in accordance with counsel's "map 16." (It would seem

that the remark of Mr. Justice WILKIN in *Hardin* v. *Shedd* that this "was in effect claiming the whole lake bed," was not inappropriate.)

So that it is thought that counsel for Mr. Shedd is not called upon to justify the accuracy of the State Court's decree upon the principle of "accretions," *if* the principle be right; and he has thought it scarcely necessary to prolong this document with many citations and explanations in justification thereof.

But we give such as we think are ample in case the court is impelled to review said decree.

AS TO THE FINDINGS OF FACT BY THE STATE SUPREME COURT IN FULLER V. SHEDD.

It would seem to be unnecessary at this late day, to refer to evidence in the record to sustain such findings of fact.

Four courts have passed upon the facts, Judge GRESHAM (whose findings are reported in *Hardin* v. *Jordan*), this court in said case of *Hardin* v. *Jordan*, Judge TULEY, and the State Supreme Court in *Fuller* v. *Shedd*, and there is but little variance in the findings; those of the State Supreme Court being the most explicit in respect to the original character and extent of the ridge and the growth of accretions.

The growth and extent of accretions was of necessity involved in the labors of said court upon the first appeal, and in this way: Voluminous testimony had been given as to the whole *history* of the land and water, the height and depth of each, etc., the amount of land that was formerly permanently above the water, etc., and also the actual conditions in later years. It was

argued by the second patent counsel that the land on both sides of the ridge and between the tongues of land had existed at the time of the first survey in 1834–5. Said court found and had to find what land existed at the time of the commencement of the suit, and had to account and did account for it. It had to find and did find that part of this land had grown as *accretions*, and finding what this part *was* of necessity found the amount of *permanent* land in 1834–5. This was done in order to test the question of mistake or fraud in the original surveys. All parties were in court, and were heard upon all these facts and had a right to anticipate any *theory of law* that might ultimately be held to be right. They were also all in court upon the hearing on the appeal, and bound by the court's action thereon. In justification of its findings, said court gave its interpretation of the evidence and a history of the formations, and accounted specifically for them.

In the State Circuit Court Mrs. Hardin produced a certified copy of the findings of fact preceding the opinion in *Fuller* v. *Shedd* (161 Ill., 462), and contended that these should be taken in connection with those stated in the opinon, because delivered by his Honor Mr. Justice PHILLIPS, who delivered said opinion. The enumeration of those findings for Judge TULEY's use referred to in his opinion upon the last hearing before him (Mr. Dent's brief, p. 221), were as follows:

1. Page 466 of the Report: There existed at the time of the original survey *a ridge* between fractional Section 29 and South West quarter of Section 20, which was but *slightly* covered with water, and at sev-

eral points along this ridge islets existed, one having trees growing thereon.

2. That "an outlet from the west side of the lake connected with the Calumet river, through which the water flowed from the west part of the lake."

3. At different seasons of the year as early as 1841 the ridge was often above the level of the lake, and in the course of a few years the ridge materially increased in width and was above the level of the water at ordinary stages. The land on the ridge and along the margin of the lake above the mean level of the lake *existed in* 1874. That the plat on which the second survey was based did not show "the ridge" (*continuous*), which at ordinary stages was *above* the water and contained a large number of acres of dry land.

4. By *reason* of this (*continuous*) *ridge* the water was divided into *two lakes*. That to the east was known as Wolf Lake, and that to the west known as Hyde Lake.

5. He further finds, p. 472 of opinion: At the time of the original survey the tongue of land from the north extended south from the center line of Section 20 about 220 rods, and the tongue of land from the south extended north from the south line of Section 29, about 160 rods.

6. That these two points at their extremities were about 80 or 90 rods apart.

7. The level of the waters of the lake when they reach the meandered line of the original survey would be about 2.2 feet above datum.

8. Reeds and coarse grass grew in the water around the margin of the lake and between these two points.

9. A strip twenty to twenty-five rods wide on both sides of the *ridge* (*continuous*) and around the margin of the lake became dry land *since* 1874. Page 473.

10. That there was no fraud or mistake in the original surveys (and hence it follows that the patentees under the first patents took all the land in sight).

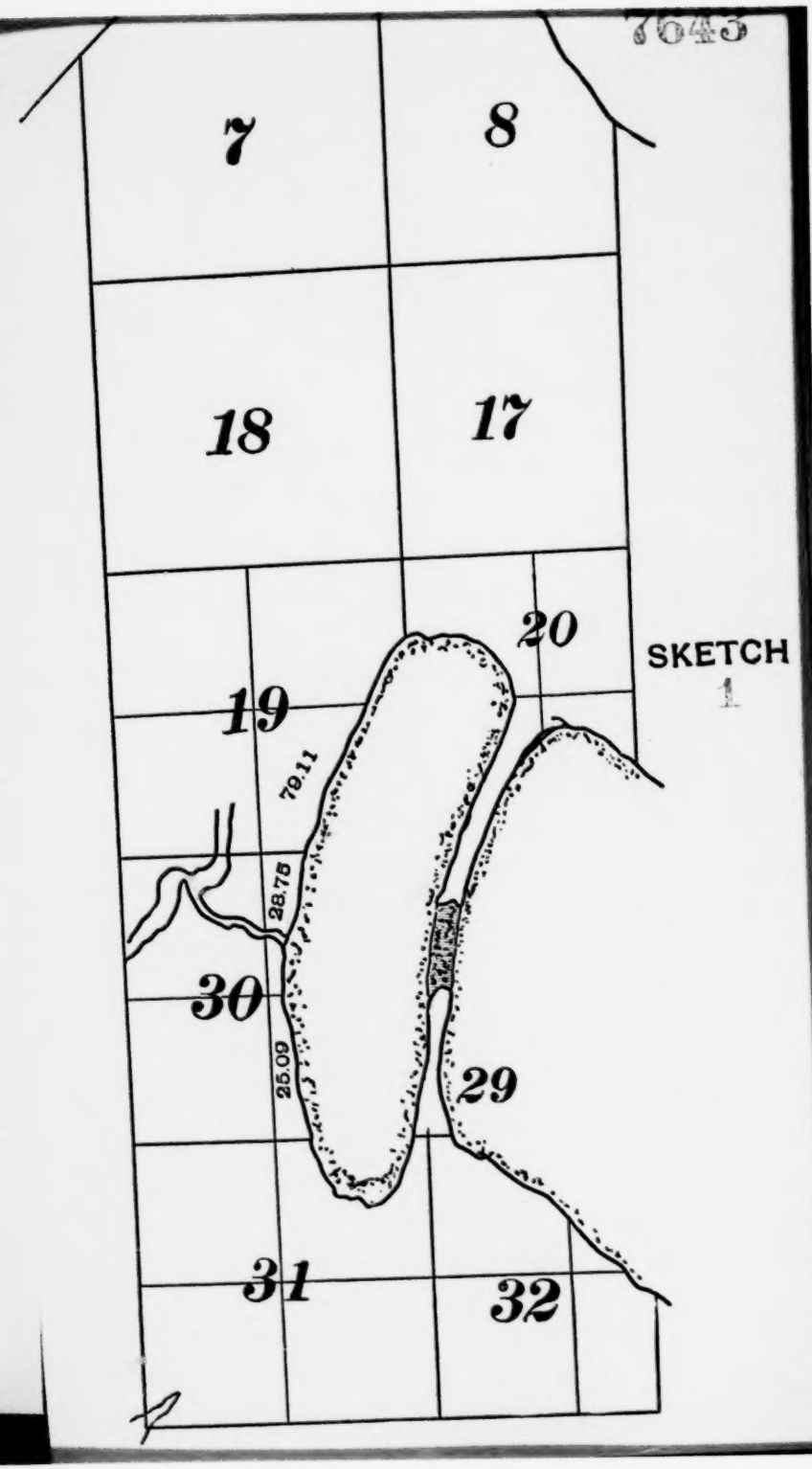
11. That the lake was two to three miles long from north to south and about the same from east to west. (Page 471.)

If these findings of facts are adopted, there is little or no use for much argument nor for many explanations here. If the one lake had become divided into *two* lakes, there can be no plausible claim that Mrs. Hardin's land bordering on the one, can take land on the other.

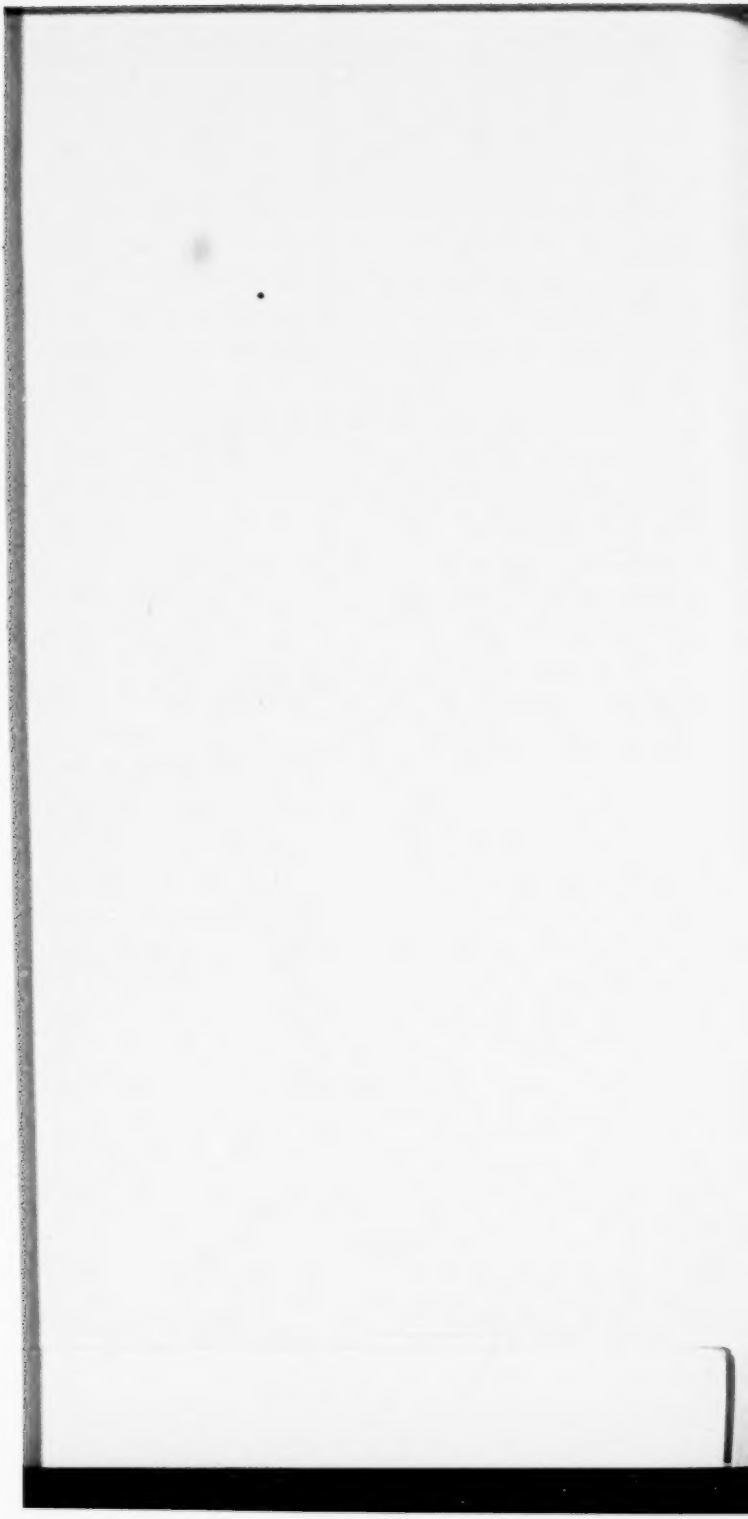
Meander lines cut no figure in this case, except where they coincide with actual shore lines and then only by *reason* of such coincidence (as shown elsewhere and not heretofore disputed) the status as to actual shore lines at time of original survey averaging up the width of the north tongue of land at about twenty-eight rods would be something like this: ("Sketch 1.")

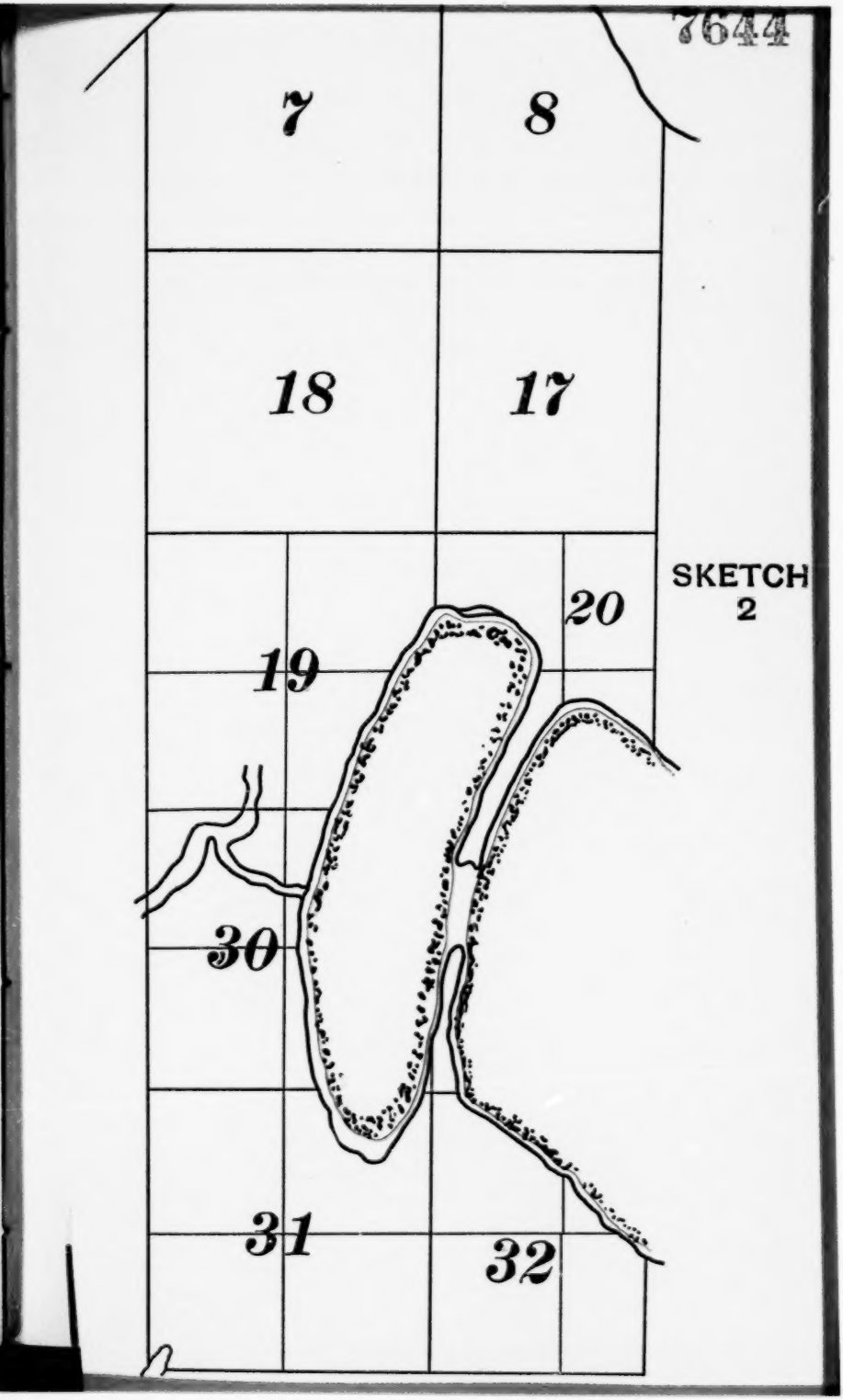
(Between the two points the ridge is meant to be represented as slightly covered with water. The dots represent marsh.)

7643



SKETCH
1




7644
7
8
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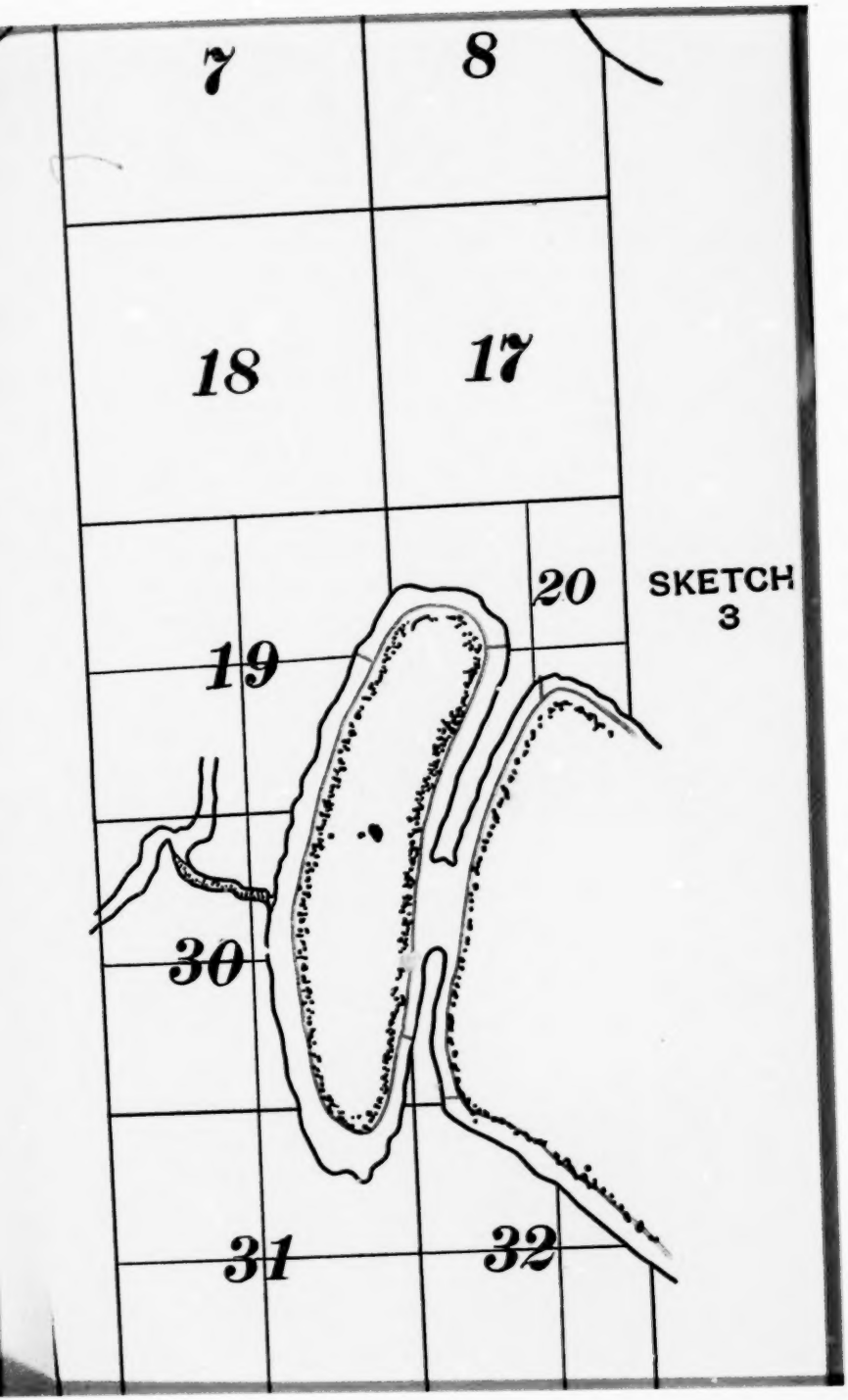
31
32
SKETCH
2

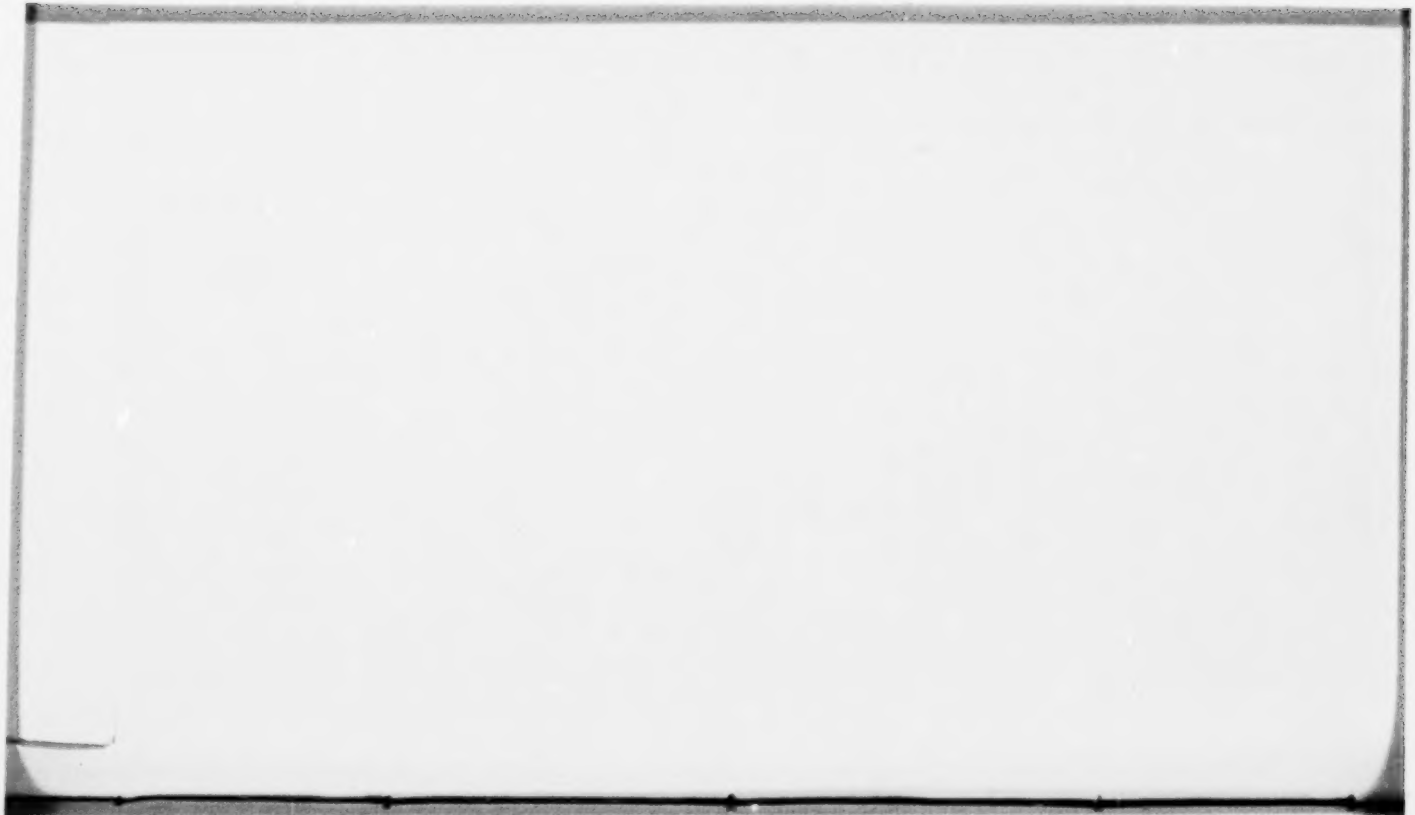
In the course of a few years the *ridge* increased in width and was at ordinary stages "above the level of the water", so that in 1874, by reason of *the ridge* (*continuous*) the lake was divided into two lakes, and the outlines might be thus shown: ("Sketch 2.")

(The red line represents the new shore line.)

Since 1874 there was a further recession, causing dry land to appear on both sides of the ridge and covering a strip around the margin of the lake of twenty to twenty-five rods wide, and the sketching would be something like this: "Sketch 3."



SKETCH
3



These three rude sketches are meant to be illustrative of the findings of this court as to the three points of time, the first, 1834–5, the second 1874, or prior thereto, and the third the time of the filing of the petition or some date prior thereto when the twenty to twenty-five rods strip was found to have become permanently dry.

It was appropriate, therefore, for Judge TULEY, taking up the work where the State Supreme Court had left off to take the last situation and apportion the accretions thus displayed in the third sketch.

~~In doing so he took the *actual* shore lines on sketch 1, and then ran the apportioning lines as shown on "sketch 3,"~~

ACCRETIONS.

Definition: Accretion is the process of gradual and imperceptible increase of land caused by the deposit of earth, sand or sediment thereon by *contiguous* waters.

Accretions or alluvion is the *result* of this process. (Vol. 1, Am. & Eng. Enc. of Law, 2d Ed., 467.)

Whether the waters are *navigable or unnavigable* is ordinarily a matter of indifference. The only instance in which the navigability of the body of water is of importance being when the existence or non-existence of this characteristic determines the ownership of the shores, bed or bottom. (*Id.*, 468.)

Reliction, when applied to the land left dry by gradual recession, is regarded the same in effect as alluvion and the *same principles* are held to regulate both. (*Id.*, 473.)

The right to accretions depends upon *contiguity*. *Id.*, Note 2, page 473 *id.*

As accretions are a growth, it is necessary that where one claims land by reliction or accretion, he should show the *history* of the formation. *Id.*, 474, note.

> "The right to future accretions is inherent in the property itself and forms an essential attribute of it, resulting from NATURAL LAW in consequence of the local *situation of the land*, just as much as the natural fruits of a tree belong to the owner of the land." *Municipality No. 2* v. *The Orleans Cotton Press*, 9 La., 437.

The general rules of apportionment of flats on tidal rivers and the seashore under the old colonial ordinance which are held to apply in cases of accretions in inland rivers and lakes, *Kehr* v. *Snyder*, 114 Ills., 313, are shown on page 521 of 9 Gray (Mass.) Reports. Some of them are as follows:

> 1st. The intention of the ordinance was, "if practicable, to give to every proprietor of the flats in front of his upland, of equal width of his lot at low water mark."
>
> 2d. The nearest channel from which the tide never ebbs, though not adapted to navigation, is the limit.
>
> 3d. The direction of the side lines of the flats is not governed by that of *the side lines of the upland*.
>
> 4th. Where there is no cove or headland, a straight line is to be drawn according to the general course of the shore at high water, and the side lines of the lots extended at right angles with the shore line.
>
> 5th. Around a headland, the lines dividing the flats must diverge towards low water mark.
>
> 6th. In a shallow cove, in which there is no channel a base line may be run across the mouth of the cove, and parallel lines drawn, at right an-

gles with the base line, from the ends of the division lines of the upland to low water mark.

7th. A deep cove, out of which the tide entirely ebbs at low water, is to be divided by drawing a line across its mouth, giving to each proprietor a width upon the base line proportional to the width of his shore line, and then drawing straight converging lines from the divisions at the shore to the corresponding points on the base line.

8th. The direction of the side lines of flats in a cove may be modified by the course of the channel bounding them, or by the position of other channels between part of that channel and the upland.

9th. It seems, that after passing the mouth or narrowest part of a cove, the lines may diverge, if necessary to preserve the proportions of different estates.

From these rules it is apparent that the disposal in the decree of the accretions in the bays or coves upon the east and west sides of the north end of the ridge was accurate. The extension of the east and west center line of section 20 naturally divided the accretions in the bay on the west. The extension of the north and south center line of said section naturally divided those in the bay on the east; or at least was slightly to the prejudice of Mr. Shedd, a south-easterly extension instead of a southerly one being suggested by the contour of the original shore line.

However, with these division lines as well as with the one extended east along the south boundary of section 29, Mrs. Hardin has no concern. Nor is Mr. Shedd affected by the extension of the east and west center line of fractional section 19, which evidently is prejudicial to Mrs. Hardin's neighbor upon the north. The more accurate method obviously was to extend it

southe-asterly at right angles with the original shore line.

Complaint, however, is made (pp. 164 to 169 of Mr. Dent's brief) particularly of the finding that the South tongue of land or fractional Section 29, extended north 160 rods, and of the extension of the dividing line north-west from about the 160 rods point across a part of Section 30, if squared out.

The answer is:

1. The line should have been run in the same direction, but have been placed 40 rods further *south* viz.: at a point where the shore line originally crossed the north and south line dividing fractional Section 29 and the fractional East one-half South East one-quarter of Section 30, as found in Judge TULEY's former opinion (p. 215 Mr. Dent's brief).

Thus Mrs. Hardin was awarded about 40 acres more land than she was entitled to.

Defendant in error did not assign cross-error in the State Supreme Court on this account, but it is thought that he could have done so with good ground.

2. As said South tongue in any event lay some distance east of the said north and south dividing lines and since all accretions around a headland naturally belong to it, possibly the line should have been extended directly *west*.

3. The line of 40 degrees run by Judge TULEY was at a right angle to the direction of the shore line of the tongue of land at the latitude of the starting point of said 40° line, and it was given its direction on this account.

The finding that Hyde Lake had originally been a separate body of water, or had become such land prior to the suit, admits of no contradiction.

1. The average height of the land on the intervening space is about 2.3 feet above datum. (Map C, Record, 91.) Allowing that the process of land making by vegetation (mentioned in *Fuller* v. *Shedd*) has added the .3 foot, and assuming that the water in 1834–5 had been at 2.2 feet above datum, as has been four times found judicially this finding that the 'intervening space" was then but "slightly covered with water" (.2 foot deep) is very exactly accounted for. Had this portion of the ridge arisen .3 foot in 1874, water at 2.2 feet above datum would make it solid land at that time.

2. Assume further that there was more direct communication between the waters of Wolf and Hyde lakes and those of Lake Michigan about 1874 and subsequently, by reason of the frequent disturbance of the sand bar at the mouth of Wolf river and the dredging of the Calumet river. This would cause the waters of said two lakes to seek the level of the waters of Lake Michigan (which for twenty years had averaged 1.8 feet above datum). We have then the intervening space .5 feet out of the water—surely enough to warrant a claim to its being "uncovered or laid bare," and to have become solid land.

3. Or we further allow for the evaporation which in such shallow lakes would make a susceptible difference, say .2 foot more on this account, we have the intervening space .7 foot out of water.

If the state court's ruling is adhered to in this court, it is, of course, immaterial what "breaks", if any, there were, in the continuity of this ridge.

For, undoubtedly all the land along the ridge became dry first, and as each portion of the ridge, if submerged, rose out of the water, it attached itself to the adjoining knolls or ridges.

In other words, if several of these higher places along the line of the ridge originally constituted "islands," which counsel evidently has striven hard to show, each of them upon the recession of the water would have taken the uncovered land immediately around it as accretions and divided with the next island north or south of it, the space intervening between them when it all should have become dry.

The finding that the whole ridge had become dry while there was water to the west, precludes all claim that land *west* of the water could take any of the ridges as an accretion.

As to the law upon this theory of island accretions above stated, see:

Benson v. *Morrow*, 61 Mo., 345.
Cooly v. *Golden*, 117 Mo., 33, and 21 L. R. A., 300.

We do not recall that it is claimed anywhere in our opponent's brief in this court that Hyde Lake had "shallowed into ponds" before this suit was commenced, or *at the same time* that the eighty or ninety rods intervening space became dry.

This was an impossibility as shown by the elevations on map C. (Rec., 91.)

Even so, the said "space" would have belonged to the two tongues.

For, if both the bed of Hyde Lake and said space had appeared like the rising of a plane out of the water, it would have been apportioned in the same manner as if accretions had grown to the whole bank of the lake and around the point of the tongues *equally*.

If this latter process had taken place and continued it will be perceived that when forty or forty-five rods of accretions had attached to the lake's original shore line the intervening space would have been entirely closed up, leaving a large body of water between the then continuous east bank and the west bank.

The law as to these "plane" accretions, so to term them, is found in

Am. & Eng. Ency., 2d Ed., Vol. 1, 474.
Buse v. *Russell*, 86 Mo., 209.
Bigelow v. *Hoover*, 85 Ia., 161.
Naylor v. *Cox*, 114 Mo., 232.

~~Brewer.~~

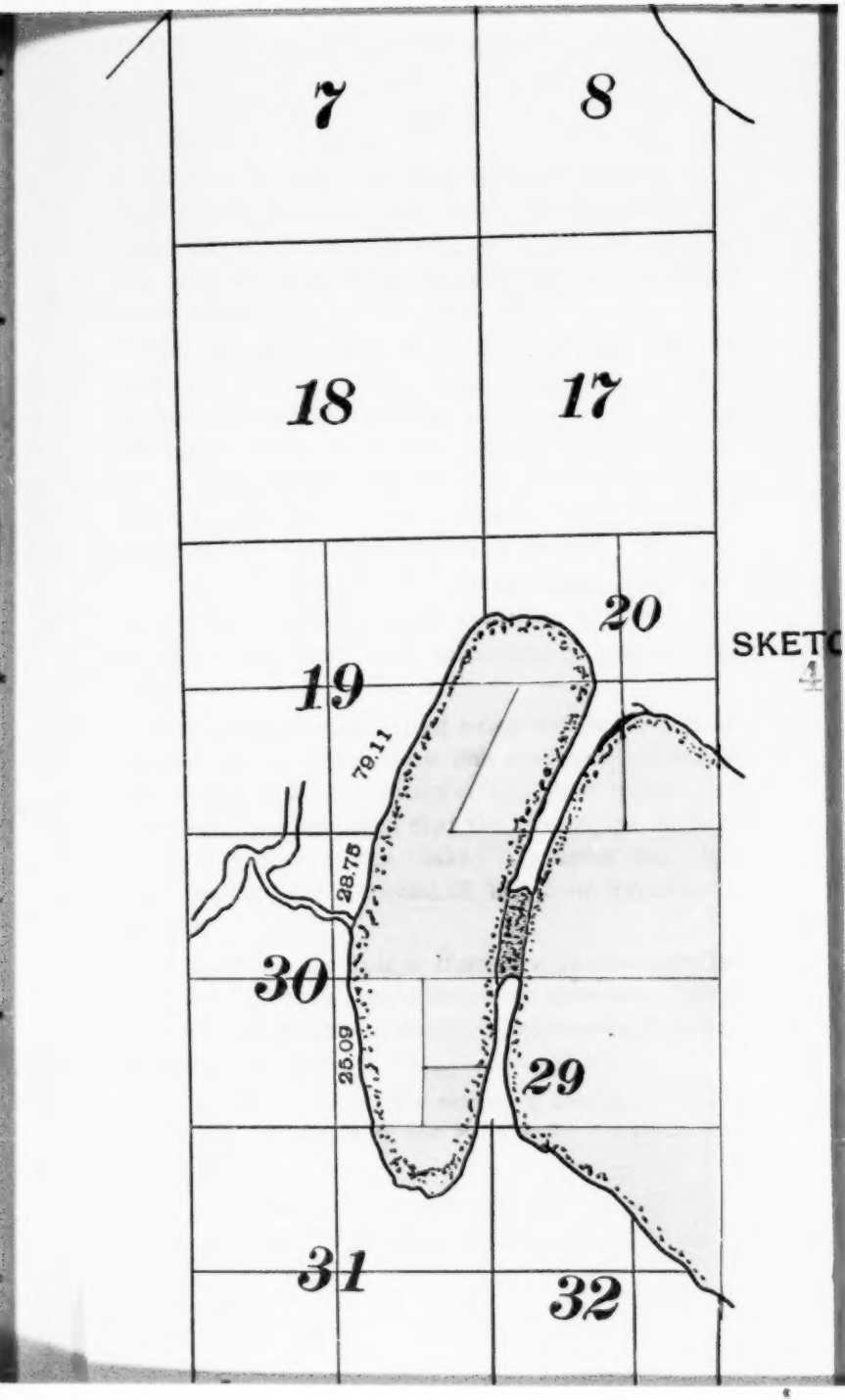
VII.

DEFENDANT IN ERROR IN FACT TAKES NO MORE LAND BY THE DECREE UPON THE ACCRETION BASIS THAN HE WOULD HAVE TAKEN IF THE TITLE TO THE SUBMERGED LANDS HAD BEEN HELD TO HAVE PASSED UNDER THE PATENTS.

As to the first decree of the State Circuit Court of August 10, 1892. (Rec., 416.)

Judge TULEY, assuming that the law of the case was to be derived from *Hardin* v. *Jordan* (140 U. S., 371) and that there was private ownership of the bed of the lake, recited in his original opinion the actual status of the land and water at the time of the orginal survey. He held that the tongue of land on the South extended North to the east and west center line of Section twenty-nine (29), squared out, and that the North tongue extended South to about the South line of Section twenty (20), squared out.

In such case, the decree, on his assumed basis of law, could only have been correctly entered after an actual survey of the whole lake for this special purpose, a finding of its center and an extension of boundary lines converging towards the center. Or if there were two lakes to apply this method to both. He with no such data at hand seized upon the section lines viz.: The South line of Section twenty (20), squared out, and the center line of Section twenty-nine (29), squared out, as the only lines available, and at-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tempted to extend those lines as boundary lines, confessing that probably they would trespass upon the rights of other parties owning tracts not involved in the suit, but attempting to make them binding as between Shedd and Hardin. (See "Sketch 4.")

That he was clearly in error as to the original extent southward of the North ridge is shown by the unbroken line of trees described in the testimony, and especially shown in a plat (which Mrs. Hardin offered), as extending just about sixty rods or more, south of the South line of Section twenty (20), if squared out. (Hardin's Exhibit 1, Record, 173.)

It is also proven by the elaborate map "C," which shows high elevations extending to almost the middle of the North half of Section 29 squared out. (Record, 91.)

The assumed necessity of using the South line of Section 20 for a boundary line evidently influenced his finding as to the extent of the North tongue. He could not have supposed that the site of the McDaid house had always been "lake." It seems clear that this finding was a species of heroic or forced compromise.

In applying the rule of *Hardin* v. *Jordan*, it is not clear how the lines should have been extended, even if the plats and measurements in evidence were sufficiently accurate *data* therefor.

Judge TULEY found the center of the lake to be in Indiana a little east of the state line. (Brief of Mr. Dent, p. 216).

Upon the basis stated, and taking the extent of the ridges as found by the State Supreme Court, his divis-

ion should have been something like that shown in following "Sketch 5."

(In sketches 4 to 7, the green denotes land awarded to Mr. Shedd, the pink shows that awarded to Mrs. Hardin.)

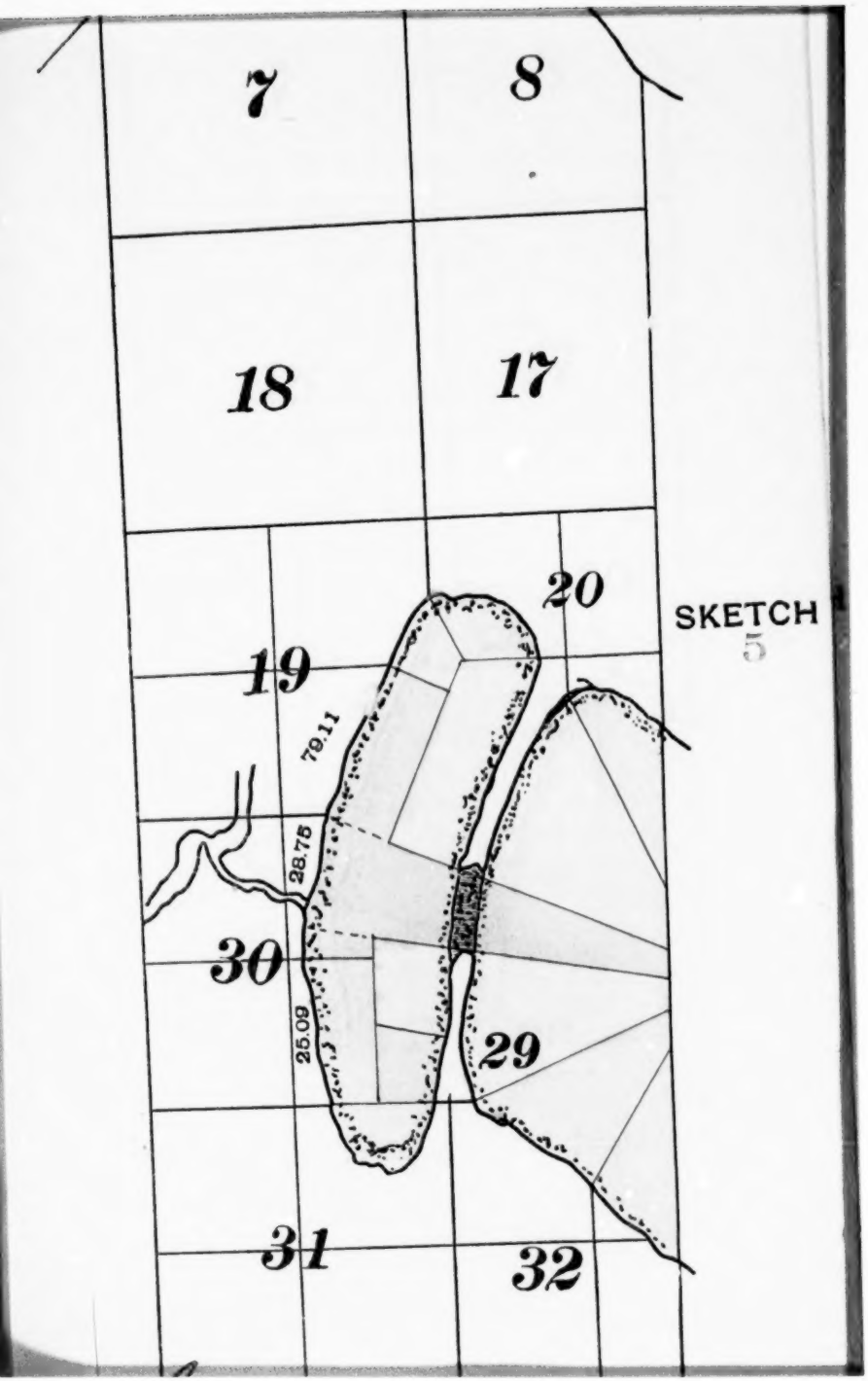
However, the Illinois court had no judicial knowledge of the Indiana side of the lake. Thus the state line could have been taken as the limit and the Illinois portion dealt with as an entire lake with an absolute wall or barrier on the state line. In which case a center would have been found a considerable distance west of the state line and the division could have been made something like that shown in "Sketch 6."

But inasmuch as the two tongues of land approached so near to each other it does not seem that Mrs. Hardin's shore line, lying way to the west, should be the basis of extending her side lines to take in this intervening space between said tongues.

Hyde Lake was, in 1834–5, either a separate lake or a distinct harbor or division or large cove of the one body of water.

The ridge was practically continuous, there being only marsh or grass in the intervening space between the tongues. (Judge GRESHAM therefore constantly speaks in his findings of a "lake or lakes.")

If the rules of the United States survey did not require narrow tongues like these to be meandered (which is now a well-known fact), it would seem to have made no difference in this case whether they approached near to each other or actually joined each other.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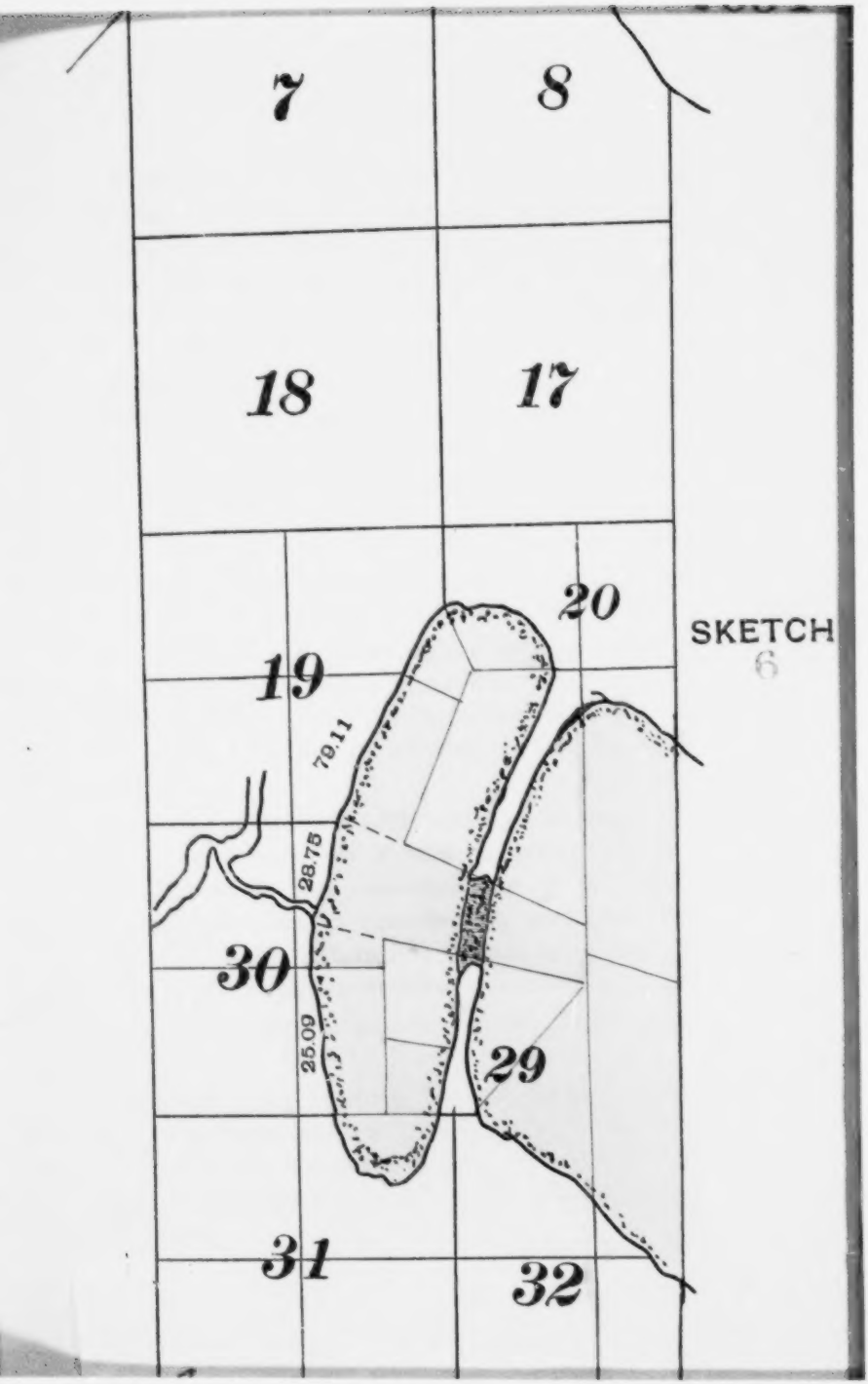
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A lake with a permanent reef or tongue of land extending across it so definite and permanent as to physically and continuously separate the water into two bodies, but so narrow as not to pay for the cost of survey, could, it would seem, be appropriately platted as one lake, as this one was.

In such case the meander cutting no figure, the continuous ridge would belong to the purchasers of fractional Section 29 and the Southwest fractional one-quarter of Section 20, each taking half of the portion between the two meander lines. And thus in case of a "lake bed" division, Hyde Lake would have been divided by a line extending up and down the middle of it, Mrs. Hardin taking only to the middle.

But conceding that the eighty or ninety rods of marsh between the two tongues was "lake" and not "land" how much less of the Hyde Lake bed should the two tongues of land be awarded than in the other instance?

We suggest that possibly the fact of there being eighty or ninety rods of water space would allow Mrs. Hardin to come somewhat east of the middle line of Hyde Lake, in extending the side lines from that portion of her shore line directly opposite to and co-extensive with said intervening space on the ridge.

But should they be extended *as far as* said space? or *across* it?

The said space adjoined the two tongues of land and by giving each of said tongues one-half thereof (or 40 or 45 rods), we would seem to be doing a more natural thing than to give it to a shore 160 rods across the water.

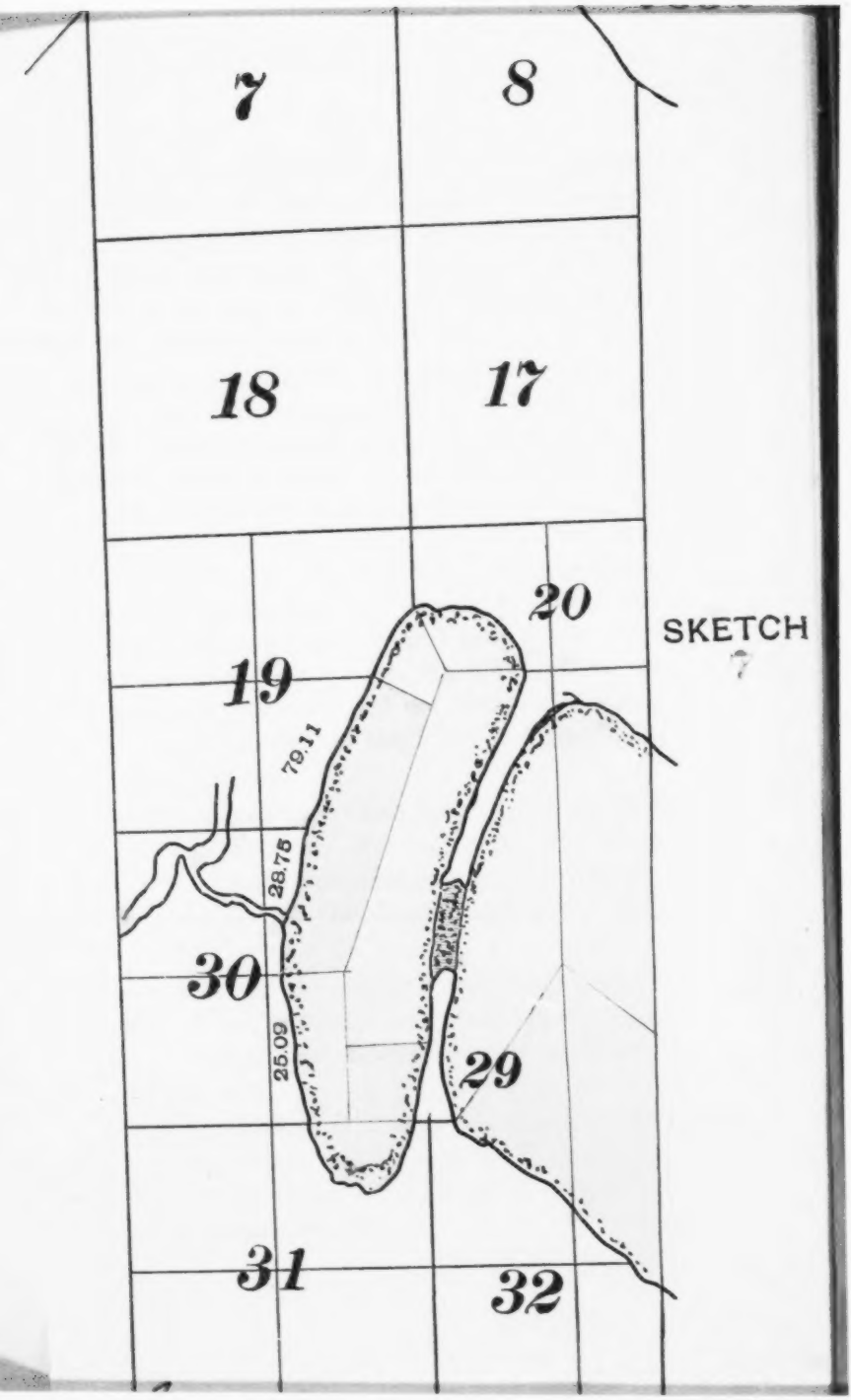
In such case the showing in "sketch 7" is thought to be accurate.

So it would seem that in any event Mrs. Hardin could not get much, if at all, beyond the middle of Hyde Lake.

Counsel have taken great pains to show some depressions in the land south of the Field house, and to argue that the southern ridge was not continuous; and have repeatedly referred to the site of the Field house as "Elm *Island*", a name repeated by very few witnesses or scarcely any outside of Mrs. Hardin's husband. Rec., 390–1, 239.) While there were some occasional depressions in the space in question, yet the elevations shown upon "map C" (Rec., 91) indicate an almost continuous height of at least 2.2 feet above datum, the height of the water which would cause shore lines to be generally identical with those of the 1834–5 survey. It is not thought necessary to refer in detail to the mass of evidence in the record which sustains the finding as to the extent of these tongues of land. The Thomas house was built upon this space ("map 7" p. 44, Mr. Dent's brief.)

As to the railroad map (*id.*, p. 41) it is sufficient to say that the road was not surveyed or built upon the ridge, but upon the western slope of it, and to a great extent in the marsh along its western margin, the road bed being composed of dredgings from a deep and wide ditch on the west thereof. (*id.*, p. 42.)

As to "map 16," (*id.*, p. 147), enough is revealed in the reports of the cases of *Hardin* v. *Jordan* and *Fuller* v. *Shedd* to show that counsel for Mrs. Hardin did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not question but affirmed the doctrine that a meander line is not a line of boundary, and that in the absence of fraud or mistake the purchaser of a meandered fractional quarter, took title to *all* the existing land and the grant to him was co-extensive therewith. This rule has been consistently held to be correct.

Now, when the Southwest fractional one-quarter of Section 20 was meandered and sold out to De Witt (Mr. Shedd's remote grantor-in-title), the latter took all the land in sight, extending to the 220 rods point, or extending 40 or 45 rods further south if the ridge be treated as continuous. Hence, De Witt got title to 25 or 30 acres of solid land instead of only to the 4.53 acres inside the meander. In this he might have been lucky. But by a rule of the United States land department such long narrow spurs or tongues or ridges were not surveyed, and not reckoned in fixing the purchase price; and so the fruits of his purchase were legitimately his.

While others might envy him his good fortune, they were not injured by it. For all parties purchasing upon bodies of water were presumed to have regard to and to take notice of the actual shore lines and all other physical facts.

If, therefore, this 25 or 30 acre tract, with its peculiar formation and elongated shore line had as appurtenant to it a great deal of lake bed, it constituted no wrong to any one.

Or, if through a series of natural processes by accretions thisoriginal tract had become a much larger tract several times as large as its original size, still it constituted no such wrong.

The responsibility for the liberality to De Witt in the former instance lay with the government; for that to his grantees in the latter instance, it lay with the government and nature combined.

The government is not complaining or seeking to recall its deed.

And in accretions we follow nature, and to her we cannot dictate.

If De Witt or his grantees have through the action of the government and nature combined come out better than they have deserved, the plaintiffs in error are guiltless at all events and should be free from any feelings of self-reproach therefor.

But speaking of luck, it may be remarked that the 2.04 acres in the fractional East one-half of South East one-quarter of Section 30, which evidently was all the land covered by such description has been well treated in the growth of accretions, having taken about ninety acres by the decree in question. (See "map No. 8", Mr. Dent's brief, p. 176.)

If Mr. De Witt acquired by his patent the whole of the North tongue extending south to the McDaid house at the 220 rod-point, it is hard to understand why Mrs. Hardin should be awarded approximately the south two-thirds of this tongue of land, with all submerged land on both sides of it as per " map 16;" or why she should be given the north two-thirds of the South tongue in fractional Section 29 with adjoining submerged land on either side of it.

Evidently the maker of this map (for use as a suggested division between the parties) has been guilty of no undue liberality to Mr. Shedd.

The counsel refer (p. 161 of brief) to some expression of this court in *Hardin* v. *Jordan* in reference to the extent of the projection of land from the north, viz.:

> "It does not appear to have extended far enough southerly, *at least during high water*, to be opposed to the property of the plaintiff."

Mr. Justice BRADLEY was here evidently thinking of the rule applicable to lands bordering on tidal waters in which high water mark is adopted.

Whereas the rule now settled in most inland water cases is that the shore line is to be taken as of a time when the waters are "free from disturbing causes," or when they are at "ordinary stages." *Fuller* v., *Shedd, supra.*

This as repeatedly stated, was 2.2 feet above datum. Had this court had in evidence "Jordan's map C" (Rec., 91), showing elevations during the whole length of this projection of from 3 to 5 feet, or Hardin's Exhibit (Rec., 173), showing the unbroken line of trees, it would certainly not have made this remark.

As to some suggestions in the brief of plaintiffs in error:

1. At page 155–7 and in several other places, counsel, in the effort to minimize the extent of the tongues of land quote from Mrs. Hardin's pleadings in respect to it.

The relevancy of this is not perceived.

As said elsewhere, the claim of Mr. Shedd was for all of fractional Section 29 and fractional South West one-quarter Section 20, and for adjustment of riparian rights.

In the petitions or answers in the case the statements of physical facts were mere surplusage and cut no figure.

2. Asking this court to accept the rule of *Hardin* v. *Jordan*, the "lake bed" theory of division, it is in the interest of Mrs. Hardin to minimize the extent of the ridge or tongues as they existed in 1834–5.

To this end her counsel have made a volume of suggestions towards showing that the water at the time of the original survey was quite high. It was estimated by the witness Rossiter upon his second examination to have been about four or five feet above datum (Record, 367), or from 3 to 5 feet (Rec., 318). The references to sustain this claim are chiefly to the opinion of this witness. A number of references are made to the testimony of various other witnesses (Brief, pp. 44 to 47), and elsewhere generally to the effect that they "had seen" the water come up to such and such a height, etc., evidently referring to flood times, the height of the water varying greatly on account of local conditions.

As to the witness Rossiter, the record shows a rather spicy cross-examination (Rec., 325-332, 341, 371); and his statements could hardly be singled out with much confidence from the mass of evidence given by many witnesses to support an estimate peculiar to him alone. His statement should hardly be taken against the judicial finding of four different cour s.

It is apparent from "map 1" (Rec., 61) and "map C" (Rec., 91) that water at the height of five feet above datum would have submerged half the township.

As to this court's appropriate order in the case.

It is thought this court is apt to hold the whole question involved herein as one of local law.

But in any event it seems to us, it should not reject findings of the State Supreme Court in *Fuller* v. *Shedd*, that court being the ultimate judge of the facts so far as state forums are concerned.

It is hardly to be conceived that this court would be disposed to enter a final order here running boundary lines based upon the recent claim of plaintiffs in error that there *was no ridge whatever* in 1834–5, and that the meander ought to be taken as *correct* as to the actual amount of dry land.

A great mass of the evidence was given upon the part of the second patentees, who dropped out of the case after the *Fuller* v. *Shedd* decision, which is omitted from this record.

This, however, all parties to the case, Mr. Shedd included, had the benefit of.

In the stipulation (Record, 457) it is agreed that certain pleadings and certain evidence should be included in the record, and in paragraph 8, that the pleadings of Jordan and other second patentees "and all documentary and other evidence relating thereto, except as herein provided, may be excluded, and only such parts of the testimony given on the hearing as may be necessary to show tne physical condition of the lake and lake bed may be included."

This was evidently made for the purpose of enabling the court to pass upon the main question of whether the rule of "accretions" or the rule of private ownership of the bed was to control. It evidently would

have been burdensome to the court to load the record down with all the evidence as to physical facts.

It is not thought that even if this court should hold to the *Hadinrv. Jordan* rule, it would overturn a finding of facts delivered judicially upon the same issue four times, and base such action upon the "estimate" of *one* witness, whom it had no chance to see upon the stand!

If "sketch 7" be substantially correct (as we contend it is), as showing a proper apportionment in a lake or lakes of a shape similar to Wolf and Hyde upon the basis of private ownership of the bed, Mrs. Hardin has taken by this decree about forty- or forty-five acres of land belonging to Shedd; Shedd has taken no land belonging to her; and her only cause of complaint is that the court did not allow her the west half of the land yet remaining submerged by Hyde lake.

Even if this complaint were heeded a restoration of said portion to her would only be done upon restoration by her of the forty-five or fifty acres belonging on either theory to Mr. Shedd.

And if her statement and her counsel's claim is true that by 1891, Hyde lake had "shallowed into ponds," or become substantially dry, she has scarcely a complaint at all. For, by the very definition of her rights in and by the terms of the decree, her boundary line shifts with the water. And in such case it actually has shifted to the middle line of what was formerly Hyde lake, the bed thereof being shown to be practically level.

It is not believed that the court will reach a serious consideration of the suggestions under this last heading. But it was thought not inappropriate to run out the theory of the opposition to its ultimate consequences.

The actual complaint thus seemingly becomes trivial, and is thrice barred from this court's notice.

It is respectfully submitted that the writ of error should be dismissed; that in the alternative the judgment should be affirmed.

HARRY S. MECARTNEY,
For Defendant in Error.